CHAN SIT HOONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) October 4, 1974]
[Seremban — Criminal Appeal No. 14 of 1974]

Criminal Law and Procedure — Sentence — Charge of possession of raw opium — First offender — Sentence of imprisonment excessively severe — Fine substituted instead — Dangerous Drugs Ordinance, 1952, s. 6.

In this case the appellant had pleaded guilty to possession of 8 lbs. 8 oz. of raw opium and had been sentenced to one year's imprisonment. He was a first offender and had a sizeable family to support.

Held: in the circumstances, the sentence of imprisonment was excessively severe and a fine of $2,000 in default three months' imprisonment should be imposed instead.

Cases referred to:-

(1) *La Soo & Anor.* v. *Public Prosecutor* [1965] 1 M.L.J. 235.
(2) *Oloofsen* v. *Public Prosecutor* [1964] M.L.J. 305.
(3) *Khor Seek Pok* v. *Public Prosecutor* [1958] M.L.J. 170.
(4) *R.* v. *Ball* 35 Cr. App. R. 164.

CRIMINAL APPEAL.

Stanley Ponniah for the appellant.

Abu Hashim bin Haji Abubakar (Deputy Public Prosecutor) for the respondent.

Ajaib Singh J.: This was an appeal from the decision of the learned president of the sessions court at Seremban. The appellant had pleaded guilty and had been convicted and sentenced to one year's imprisonment on a charge of being in possession of 8 lbs. 8 ozs. of raw opium under section 6 of the Dangerous Drugs Ordinance, 1952. The appeal was against sentence only.

The facts of this case were that some customs officials acting on information had been looking out for a car No. BAC 3200 on three consecutive days. On 12th March, 1974, the fourth day, at about 5.30 p.m. this car was seen approaching the junction of Jalan Murray and Jalan Templer from the direction of Kuala Lumpur. Two customs officers followed this car on a motor scooter. The car proceeded along Jalan Murray and stopped and the appellant was seen getting out of this car and walking away. He had two bundles in his hands. On seeing the customs officers approaching him the appellant dropped the bundles and fled. The officers gave chase and the appellant was arrested about 50 yards away. The two bundles were sent to the chemistry department and it was confirmed that they contained 8 lbs. 8 ozs. of raw opium.

The appellant pleaded guilty to the charge preferred against him under section 6 of the Dangerous Drugs Ordinance, 1952, for being in possession of the raw opium and he also admitted the facts of the case as stated above without (as the learned president states in his grounds of decision) qualification, reservation, ambiguity or hesitation.

In mitigation of sentence before the learned president the appellant prayed for leniency on the ground that he was 38 years of age and had a wife and five children to support and at the same time he was also receiving treatment for tuberculosis. (However, during the hearing of the appeal Mr. Stanley Ponniah, learned counsel for the appellant, informed the court that the appellant was not in fact suffering from tuberculosis but from some other chest complaint). The appellant was convicted and sentenced to one year's imprisonment. The raw opium valued at about $2,400 was ordered to be confiscated.

In his brief grounds of decision the learned president states that —

> "but for the quantity of opium found in accused's possession I tend to opine that the accused is either a supplier or pusher or trafficking and that severe punishment should generally speaking, be reserved to persons such as the accused who make a living rather than for the actual smoker. Possession of opium is a serious offence and which brings untold misery to an addict. In *Lasoo & Anor.* v. *Public Prosecutor* [1965] 1 M.L.J. 235, where the learned judge had this to say.' When a person is found to have possession of opium in such quantity as to show positively and convincingly that he is engaged in trafficking in such drug the proper sentence is a deterrent sentence. A fine can never be a deterrent sentence.' In view of the facts of the case, the gravity and prevalence of the offence of dangerous drugs I am of the opinion that one year imprisonment would be most reasonable and fair. In addition the imprisonment, I hope will deter others who may have a similar aspiration."

In the case of *Lasoo & Anor.* v. *Public Prosecutor*[1] the appellants had appealed against the sentences imposed upon them in the district court at Sibu on charges of importing raw opium and possession of opium under section 4(1) and section 6 of the Dangerous Drugs Ordinance (Sarawak). They had pleaded guilty on the second charge and were found guilty and convicted after trial on the first charge. Each of the appellants was sentenced to two years' imprisonment on the first charge of importing raw opium and 15 months' imprisonment on the second charge of possession of the opium. The report, however, does not disclose the quantity of opium involved in this case.

In dismissing the appeal Lee Hun Hoe J.C. (as he then was) was in fact echoing the words of the Chief Justice of Singapore in the case of *Oloofsen* v. *Public Prosecutor.*[2] In this case Wee Chong Jin C.J. had stated that it was a most serious offence to be in possession of morphine and that:

> "where a person is found to be in possession of drugs such as this, not in small quantities which may be because he is an addict but obviously in such quantities as to show positively and convincingly and clearly that he is engaged in trafficking in this drug and unless deterrent sentences are imposed and a fine can never be a deterrent sentence in a case like this . . . the only proper sentence in a case like this is in my opinion a term of imprisonment besides a fine."

It may be noted here that in *Oloofsen's* case the drug concerned was morphine which is far more dangerous than raw opium. Again, as in the later case of *Lasoo & Anor.* v. *Public Prosecutor, supra,* it is not apparent from the record as to the quantity of morphine which was found in the possession of Oloofsen.

At the hearing of the appeal Mr. Stanley Ponniah referred to the case of *Khor Seek Pok* v. *Public Prosecutor.*[3] In that case the appellant was found in possession of 17½ lbs. of raw opium and was sentenced to pay a fine of $10,000 or 18 months' imprisonment in default. On appeal to the High Court, Rigby J. said that despite "the fact that the quantity of raw opium involved was large, 17½ lbs., in all it would seem on the facts of the case that the appellant was a carrier at most and not the principal person behind the offence itself. The appellant is a lorry driver, aged 22, with a wife and a small child. In the circumstances of the

case I, therefore, reduce the fine to one of $2,000, or 18 months' imprisonment in default."

The High Court sitting in its appellate jurisdiction will not normally alter a sentence imposed by a subordinate court unless it is satisfied that the sentence is excessively severe or inadequate to such an extent that the subordinate court must have failed to apply the right principles in assessing the sentence. The general principles on which sentences should be imposed were laid down by Hilbery J. in *R.* v. *Ball*,[4] an authority which is often cited with approval in our courts, as follows: —

"In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe. It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career. The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences."

Drug addiction and drug offences appear to be generally on the increase at least from what one can gather from the publicity given to these matters in the mass media. This is a social problem and it is a menace which we must all detest especially as it affects our younger generation. However, excessive punishments alone are not going to wipe out the drug menace. Punishment of drug offenders is not the only but is one of several means being adopted to curb if not to altogether wipe out drug abuse. Some of these methods are the control of the importation, manufacture and sale of drugs, the education of the public on the dangers of taking drugs and the treatment of drug addicts. The offence of being in possession of drugs has surely not become so alarmingly prevalent as to justify the imposition of stiff prison sentences without consideration being given to other factors which may be in favour of the offender such as his age, health, character and his background, the amount of the drug found in his possession and the circumstances in which he may have committed the offence. It is necessary also to take into consideration the kind of drug involved. Heroin and morphine are drugs which are much more obnoxious and deleterious than opium and, accordingly, the penalties prescribed under the Dangerous Drugs Ordinance, 1952, for the offence of being in possession of opium are less severe than those for being in possession of heroin or morphine. Possession of opium is punishable with a fine of $10,000 or to imprisonment for a term not exceeding five years or to both such fine and imprisonment whereas section 39A of the Ordinance provides for imprisonment for a term not exceeding fourteen years and not less than three years for possession of heroin or morphine of five grammes or more in weight.

In the present appeal before me the appellant was a first offender and had a wife and five children to support. He was a frail looking sick man of humble means and appeared much older than his 38 years. He had shown some remorse by unhesitatingly pleading guilty to the offence charged on the very day that he was called upon to make his plea in court. Also, there was the humiliation, to him and to his family, of having been arrested and charged in court and a conviction recorded against him. In all the circumstances of this case, therefore, I was of the view that the sentence of imprisonment imposed on the appellant was unduly harsh. This was his first offence. Sending him to prison where he would have mixed with other prisoners convicted of all sorts of offences might well have produced an adverse effect on the appellant and instead of coming out of the prison a better man he might well have developed more criminal and anti-social tendencies. The public interest, as Hilbery J. said in the case of *R.* v. *Ball, supra*, may best be served if the offender is turned from his criminal ways to honest living. Treating the appellant leniently in the circumstances of this case and thus giving him a chance to turn away from crime was certainly not against but very much in the public interest.

The drug that the appellant was found in possession was opium in its raw form weighing 8 lbs. 8 ozs. which, in my view, was not of such a quantity as to show positively and convincingly that the appellant was trafficking in it. In the case of *Khor Seek Pok* v. *Public Prosecutor, supra*, the amount of raw opium was about twice the amount in the present appeal yet Rigby J. held on the facts of that case that the appellant was a carrier at most and was not the principal person behind the offence itself. That case no doubt was heard some 15 years ago when the problem of drug abuse was not so great as it is now but the principle underlying that decision relating to the imposition of sentence is just as sound today as it was then — that the age, antecedent and the character of the accused are factors to be taken into consideration in arriving at a just and proper sentence. In the present case too I was of the view that the appellant was a mere carrier and not a trafficker or the person behind the offence itself although, it should be pointed out, this distinction by itself did not minimise the appellant's guilt on the charge preferred against him.

The learned president, while failing to give adequate consideration to the fact that the appellant was a first offender and that he had a sizeable family to support, was unduly influenced by what he described as the prevalence of the offence, of which he had no

statistics in support, and by the quantity of the opium which, again, was not that large as to increase the gravity of the offence and thereby justifying the imposition of a stiff sentence. In the circumstances, therefore, I decided to alter the sentence of imprisonment to a fine. I accordingly allowed the appeal, set aside the sentence of one year's imprisonment and substituted a fine of $2,000 in default three months' imprisonment.

I trust that it may not be out of place here to quote some observations made by Professor T. T. B. Koh in a short but stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18th April, 1972, and which is reproduced in [1972] 1 M.L.J. lvii. On the question of sentences imposed by the courts Professor Koh had this to say: —

"In 1970, the courts exercising criminal jurisdiction in Singapore convicted 3,734 adult offenders of seizable offences. Of this number, 92.2% were fined, 4.7% were sent to prison, 2.7% were bound over or placed on probation and 0.4% were sent to the Reformative Training Centre. It will be immediately apparent that the percentage of convicted adult offenders who were sent to prison, i.e. 4.7% was relatively small. This is as it should be because sending a man to prison should be regarded as a last resort. I take this view for the following reasons. When a convicted man is sent to prison, he is branded with a social stigma which he carries for the rest of his life. There are unfortunately very few employers in Singapore who are enlightened enough to give discharged prisoners a fair opportunity of employment. The failure by the discharged prisoner to obtain employment and the hostility he confronts from society, very often leads him to feel alienated from society. In extreme cases, it could even lead a man to reject himself. When this happens, the chances of his rehabilitation are greatly reduced for a man must have respect for himself if he is to be successfully resocialized. Another objection to sending offenders to prison is that it disrupts their family life, their social relations and their employment. Another and perhaps graver objection is that most penal institutions have what is called an inmate sub-culture and the experience of imprisonment may, therefore, be corrupting to the offender who is in prison for the first time, rather than a means of his resocialization.

... I wish to argue in favour of the view that our courts should only send to prison a convicted man who has committed a grave crime against society and who has failed to respond to other non-custodial penal measures. In the case of a man convicted of offences which have not caused grave injury to person or damage to property, and who has not previously been sentenced to non-custodial penal measures, a sentence of imprisonment should never be imposed by the courts."

Professor Koh was, of course, speaking of conditions in Singapore but they are not very much different from those prevailing here. With respect, I associate myself fully with the humane views of the learned professor and his sense of compassion and decency in the approach to the problem of punishing first offenders. A first offender, be he on a drug charge or some other criminal charge, should be dealt with by the imposition of a fine or by placing him under bond or probation, but he should be kept away from prison unless there are, in the public interest, strong reasons for ordering a term of imprisonment, such as the gravity of the offence itself and the manner in which it is committed, or as a deterrent when the prevalence of a particular type of offence has truly reached a stage that a sentence of imprisonment alone may deter others from committing that type of offence.

Order accordingly.

Solicitors: *Stanley Ponniah, Ng & Soo.*

PAPPA v. SAMINATHAN

[O.C.J. (Mohamad Azmi J.) October 14, 1974]
[Kuala Lumpur — Civil Suit No. 269 of 1972]

Land Law — Whether registered title indefeasible — Fraud — Registration effected by insufficient or void instruction — Power of attorney — Substituted power of attorney — Attorney cannot delegate outside his power — Land Code (F.M.S. Cap. 138), s. 421 — National Land Code, s. 340.

In this case the lands were held under approved applications under the provisions of the F.M.S. Land Code, the registered occupier being one Palaniandy. In 1957 Palaniandy appointed the defendant his attorney in respect of his property including the said lands. About five years latter the defendant, acting as duly constituted attorney of Palaniandy, gave the plaintiff an irrevocable power of attorney purporting to authorise the plaintiff to transfer the said lands to herself. In 1965 Palaniandy was registered as the owner of the said lands under issued documents of title. In 1970 the said lands were transferred and registered in the plaintiff's name on the strength of the two powers of attorney and a statutory declaration. In the declaration the plaintiff declared that the defendant was in India. On the evidence, it appeared that it was understood between the parties that the plaintiff should only transfer the said lands to herself on the death of the defendant. The plaintiff alleged in the action that the defendant had trespassed on the property and she applied for a declaration that she was the registered owner of the said lands and for damages and injunction. Alternatively she claimed specific performance of a sale agreement between the defendant and herself. The defendant counterclaimed that his principal was still the proprietor of the said lands and that the plaintiff had transferred the said lands into her name fraudulently and by means of a void instrument.

Held: (1) in the circumstances of this case, the registration of the property in the plaintiff's name was obtained by fraud and misrepresentation. The plaintiff had falsely declared that the defendant was in India and had applied for the transfer of the said lands without the knowledge of the defendant and on the representation that the defendant desired the transfer to the plaintiff;

(2) although failure of consideration did not make the power of attorney to the plaintiff void, there was no provision in the original power of attorney for any authority on the part of the defendant to grant to a third person power to transfer the said lands and therefore the power of attorney purported to be given to the plaintiff in respect of the said lands was null and void;

(3) as the transfer and registration of the said lands by the plaintiff to herself was obtained by means of an insufficient or void instrument, the plaintiff's title to the said lands was not indefeasible;

(4) the plaintiff had failed to satisfy the court that the full purchase price of the said lands had been paid and in the circumstances this was not a proper case where the court should enforce the sale agreement;

(5) in the circumstances the court would make an order dismissing the plaintiff's claim and also a declaration that Palaniandy was the registered proprietor of the said lands and that the name of the plaintiff be expunged from the records of the relevant land office.

Cases referred to:-

(1) *Kho Kwang Choon* v. *Phuman Singh* [1965] 2 M.L.J. 189; [1968] 1 M.L.J. 183.

(2) *Hughes* v. *Seanor* (1869) W.R. 108.

(3) *Bryant, Powis and Bryant Limited* v. *La Banque du Peuple* [1893] A.C. 170.

Authorities cited but not referred to in the judgment: *Subramania Pillay* v. *Sundarammal* [1968] 1 M.L.J. 30, *Clark* v. *Malpas* 54 E.R. 1067, *Saroj Bandhu Bhaduri* v. *Sm. Jnanada Sundari Debya & Anor.* 36 C.W.N. 555, *Chin Tai* v. *Siow Shiow & Ors.* [1971] 1 M.L.J. 67, *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221, *Abdool Hoosein Zenail Agadin & Anor.* v. *Charles Agnew Turner* 14 I.A. 111, *Dharmaratna* v. *Dharmaratna* [1939] M.L.J. 310, *Assets Company Limited* v. *Mere Roihi*